United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF & APPENDIX

Original

76-6143

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff,

vs.

ONE 1974 PLYMOUTH FURY III SEDAN, VEHICLE IDENTIFICATION NUMBER PH41K4F158253,

Defendant in Rem.

On Appeal from Judgment of Forfeiture, Granted Upon Plaintiff's Motion for Judgment on the Pleadings, Entered by the Honorable Charles E. Stewart, U.S.D.J. (S.D.N.Y.) (No. 74 Civ. 4823 (CES))

BRIEF AND APPENDIX FOR APPELLANT

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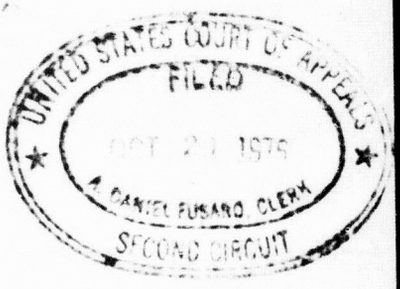

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Miscellaneous

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Did the court below err in failing to recognize decedent's standing to defend the forfeiture proceeding as the exclusive possessor of the subject vehicle which was seized as a result of his illegal arrest?

2. Was claimant denied her statutory and common law rights to continue decedent's cause of action as administrator of decedent's estate by the court's refusal to grant standing?

3. Is the evidence that may support the plaintiff's claim to forfeiture in this action inadmissible since it was obtained as a result of an illegal arrest and search of the defendant?

4. Did Judge Weinfeld's denial of the defendant's motion to suppress in the criminal action preclude a de novo determination of the issue by the court below since the entire criminal proceeding was abated by the death of the defendant?

5. Is the evidence discovered as a result of a search of the defendant incidental to his arrest for possession of contraband inadmissible since the arrest was not founded on probable cause?

6. Assuming that the evidence was admissible, did the court below err in granting forfeiture of the subject vehicle on these facts?

7. Did the court below correctly rule that 49 U.S.C.

§§781-784, to the extent that they are inconsistent with and cover the same subject matter as 21 U.S.C. §881, have been repealed by implication?

8. Is the nexus between the defendant's alleged possession of cocaine and his fleeting contact with the subject vehicle insufficient to constitute probable cause to believe that the vehicle was used or was intended to be used in violation of 21 U.S.C. §881?

STATEMENT OF THE CASE

Procedural History

On April 17, 1974, Hugo Molina-Perez was arrested by agents of the United States Department of Justice, Bureau of Narcotics and Dangerous Drugs, near the intersection of East 172nd Street and Wythe Street, Bronx, New York. The defendant was charged and subsequently indicted in two counts: (1) for possession of cocaine with intent to distribute it; and (2) for unlawfully carrying a firearm while committing the felony described in count (1).

A motion to suppress evidence illegally obtained was made before the Honorable Edward Weinfeld on August 19, 1974. Judge Weinfeld denied the motion.

A trial was held and on September 24, 1974, the defendant was convicted by a jury of both counts of the indictment. An appeal was timely filed. While appeal was pending on December 10, 1974, the defendant was the victim of a homicide.

On November 1, 1974, the United States filed its complaint in this action seeking to compel forfeiture of one 1974 Plymouth Fury III Sedan Automobile, the defendant in rem, which was seized from the defendant on the night of his initial arrest.

On February 6, 1975, Maria Molina-Perez, the widow of the defendant, filed a claim against the subject vehicle, and on March 10, 1975, claimant answered the government's complaint seeking to compel forfeiture.

On or about September 18, 1975, the government sought leave to file an amended compl nt, which was granted. Claimant filed an

amended answer on or about October 11, 1975 .

On February 25, 1976, the District Court, per Stewart, D.J., issued a memorandum opinion granting forfeiture. Judgment on the pleadings was entered for the government on or about July 15, 1976.

On September 3, 1976, Claimant filed a timely notice of appeal.

Statement of Facts

On September 24, 1974, the defendant, Hugo Molina-Perez, was convicted by a jury of possessing cocaine with the intent to distribute it and unlawfully carrying a firearm while committing a felony.

The defendant was convicted primarily on the basis of evidence obtained as a result of a search of his person incident to his arrest and a search of his apartment pursuant to an oral consent. The defendant moved to suppress this evidence on August 19, 1974, and the motion was denied.

At the suppression hearing, testimony revealed that on or about April 10, 1974, a confidential California informant had given information to Special Agent James R. Montagne of the United States Department of Justice, Drug Enforcement Agency, that a "Hugo Giving" of 1505 Grand Concourse, Bronx, New York, was a cocaine dealer who usually sold in 1/8 and 1/4 kilogram quantities. (T. 3, 16-24)* The informant described Hugo Giving as a Negro male, approximately five feet, seven or eight inches tall and

* "T." refers to the transcript of the suppression hearing before the Hon. Edward Weinfeld on August 19, 1974. The government submitted the testimony of the two agents at the suppression hearing in Perez's criminal trial in lieu of affidavits in support of their motion for judgment on the pleadings. See opinion below P-7.

approximately thirty to thirty-three years old. (T. 4, 1-4). The informant also was said to have told Agent Montagne that Giving left his apartment almost every night with some cocaine. (T. 4, 7-9).

Special Agent Montagne further testified that this informant had provided information on one previous occasion which led to the arrest and conviction of two other men for possession of narcotics. (T. 15, 13-15). Montagne testified that this previous occasion was two weeks prior to Perez's arrest, or one week prior to the time when the agent began his discussions with the informat concerning the matter of "Hugo Giving." (T. 15, 5 to T. 16, 11).

Based on this information, Agent Montagne set up a surveillance of 1505 Grand Concourse. At approximately 10:00 p.m. on April 17, 1974, Agent Montagne and Special Agent Michael Levine, parked their car in front of 1505 Grand Concourse while Special Agent Garcia and the informant parked across the street in a taxicab. (T. 18, 9 to T. 19, 5); (T. 46, 7-12). Montagne testified that at about 10:30 p.m. he received a radio communication from Agent Garcia that the informant had identified the Cuban defendant who was leaving the building as the Negro suspect Hugo Giving. (T. 19, 9-25). Montagne testified that the defendant walked west on 172nd Street toward Wythe Street, a distance of about a block, to where his car was parked. (T. 21, 10-20). Agent Garcia released the informant and he, in the taxicab, and Agents Montagne and Levine in an unmarked car, followed the defendant. (T. 21, 21 - T. 22, 6). The defendant got into his car, the subject ve-

hicle in the present case, remained there for less than a minute without starting it, until he was approached by Agents Montagne and Levine with guns drawn. They identified themselves as federal agents and immediately placed the defendant under arrest. (T. 22, 13 to T. 23, 19).

A search of the defendant's person produced a Llama .38 caliber pistol, a keycase, a wallet identifying the suspect as Hugo Molina-Perez, and $500 cash. (T. 5, 4-10; T. 6, 24; T. 25, 15 - T. 26, 5). A search of the defendant's car produced absolutely no contraband. (T. 34, 8-12).

A consent search of defendant's apartment resulted in the seizure of another gun, a quantity of cocaine, and some additional cash. (T. 36, 22 - T. 37, 25; T. 38, 12-24).

After about a half an hour, the agents left the apartment and took the defendant to the Drug Enforcement Administration Headquarters in Manhattan where the defendant was processed. (T. 40, 8-22; T. 43, 6-18). During the processing, the keycase taken from the defendant's jacket pocket was found to contain a five dollar bill in which was wrapped approximately one gram of cocaine. (T. 2, 7-23) (T. 5, 6-7). This small quantity of cocaine found on the defendant's person while he was entering the subject vehicle was the basis for the government's seizure of the subject vehicle and the government's basis for seeking forfeiture.

Hugo Molina-Perez purchased the subject vehicle on March 20, 1974 for the cash sum of $4,173 and registered it in the name of his mother, Isadora Molina. On December 10, 1974 the defendant

was the victim of a homicide. He is survived by his wife and their nine year old son.

Pursuant to the rule in Durham v. United States, 401 U.S. 481 (1971) and United States v. Floyd, 496 F.2d 982, 984, n.2 (2d Cir. 1974), this circuit vacated Perez's judgment of conviction in the criminal matter and remanded tc the district court. On July 28, 1975, Judge Weinfeld dismissed the indictment.

On September 30, 1975, claimant was appointed voluntary administratrix of her deceased husband's estate by the Bronx County Surrogate's Court. The deceased's mother, Mrs. Molina, also assigned any claim or title she might have had in the subject vehicle to the claimant shortly after Perez's death.

ARGUMENT

POINT I

THE COURT BELOW ERRED IN HOLDING THAT THE CLAIMANT LACKED STANDING TO CHALLENGE THE ADMISSIBILITY OF EVIDENCE OBTAINED AS THE RESULT OF AN ILLEGAL ARREST OF HER DECEASED HUSBAND.

In her amended answer to the amended complaint herein, the claimant sought to defend against the forfeiture of the subject vehicle in her capacity as assignee of the interests of the formal title-holder [the decedent's mother] and in her capacity as voluntary administratrix of the estate of her late husband. As assignee of the title-holder's interest, without question she could challenge the probable cause for the forfeiture of the car. She sought, however, to suppress the evidence upon which any finding of probable cause would be predicated on the grounds that the evidence was the product of an illegal arrest of the beneficial owner and exclusive possessor of the car, the decedent husband/son, Hugo Molina-Perez. The District Court did not reach the merits of this claim of inadmissibility as to the illegal evidence, finding that the claimant lacked standing to complain about the illegal arrest of Mr. Perez.

Since the District Court identified only the claimant's interest as assignee of the title-holder in its opinion (see opinion below at p. 1 and n. 1), it can be assumed that the claimant's distinct interest as voluntary administratrix

of the estate of the decedent was either overlooked or deemed immaterial to the analysis of the standing issue.* By ignoring her status as representative of Mr. Perez's estate, the District Court was led to incorrectly determine the standing question.

Insofar as the claimant sought to suppress the evidence obtained from the illegal arrest of her husband in her capacity as assignee of the title-holder's interest, it may well be that she lacked standing to do so. The cases holding that a lien-holder cannot defend against a forfeiture on the ground that the owner was subjected to an illegal arrest or search would seem to be controlling. See, e.g., United States v. One 1963 Cadillac, 250 F. Supp. 183 (W.D. Mo. 1966); United States v. One 1953 Model Mercury Sedan, 149 F. Supp. 657 (S.D. Ala. 1957); and United States v. One Buick Automobile, 21 F. 2d 789 (D. Vt. 1927) [innocent lienholders cannot assert Fourth Amendment claims of owners of vehicles sought to be forfeited.] As the government correctly noted in its reply below, Fourth Amendment claims cannot be asserted vicariously. It is not enough to be injured by the illegal evidence; it is necessary that the person asserting the claim be personally aggrieved by the constitutional violation. Thus, relying upon this doctrine, enunciated in

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*Claimant was appointed voluntary administratrix of her husband's estate by the Surrogate's Court Bronx County, New York on September 30, 1975 [see a-19]. She sought this appointment so that she might more fully perfect her defenses to this forfeiture action and did so specifically when her standing to raise such defenses was drawn into question by the government. Her formal status was specifically pleaded in her Amended Answer. [see Pars. 12-16, a - 15].

cases such as Wong Sun v. United States, 371 U.S. 471 (1963) and Jones v. United States, 362 U.S. 257 (1960) and without citing the lienholder line of cases, the District Court ruled simply that "[since] the challenge here is to a search of Perez's person...[,] claimant here cannot challenge that search nor argue for suppression of the cocaine found during the search." Opinion below at p. 4.

A proper analysis of the standing question cannot ignore Mr. Perez's death, and the subsequent appointment of his wife as his formal legal representative. In none of the above-cited cases did the standing doctrine deprive everyone having an interest in the illegal arrest of the opportunity to seek a judicial remedy. The persons against whom the unlawful acts were directed could maintain suit, seek damages, and suppress the evidence in criminal and quasi-criminal proceedings in which they personally had an interest. Their deaths prior to or in the course of such proceedings would not have terminated their right to assert those claims or defenses. In such instances the standing of the persons aggrieved would have devolved upon their legal representatives. This is not vicarious standing. It is rather a derivative standing which is universally expressed today by survival statutes and by present perceptions of our common law heritage.

In short, if Hugo Molina-Perez could have asserted a constitutional objection to the admissibility of the evidence in the forfeiture proceeding had he been alive and able to

defend, then his legal representative ought likewise be able to do so under the prevailing survival doctrines of New York and federal law.

> A. Mr. Perez, the exclusive possessor and conceded true "owner" of the subject vehicle, could have personally defended the within forfeiture proceeding by seeking to suppress the evidence derived from his illegal arrest.

The District Court found as an undisputed fact that the subject vehicle was purchased by Mr. Perez on March 20, 1974, that title was held in the name of his mother, and that subsequent to his death this title-interest was assigned to the claimant. Opinion below at n. 1. The government took the position below that:

> The claimant's mother-in-law, who was the registered owner at the time of the vehicle's seizure, did not have a possessory interest in the vehicle as she was obviously a 'straw man.' ...
>
> ...it is clear that the vehicle actually was Perez's.

Reply Memorandum of Law, p. 12; p. 17 (emphasis added). In registering the vehicle in his mother's name, there has never been any suggestion that a gift of the actual legal ownership was intended. The fact that naked title to the vehicle was in his mother's name does not alter the conceded fact that Mr. Perez had the only propriety and possessory interest in the vehicle of any consequence. See United States v. Kelly, 529 F. 2d 1365 (8th Cir. 1976). Moreover, Fourth

Amendment claims may be asserted by non-owners, provided they have a legitimate and substantial possessory interest in the affected property. See Mancusi v. De Forte, 392 U.S. 364 (1968). Accordingly, notwithstanding that title was held in his mother's name, Mr. Perez had standing to challenge the seizure of his vehicle on the grounds that it was the fruit of an illegal arrest of his person on the night in question and to seek to suppress any evidence obtained as the result of that illegal arrest from use in the forfeiture proceeding. See United States v. United States Coin & Currency, 401 U.S. 715 (1971); One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965); Boyd v. United States, 116 U.S. 616 (1886).

The government below sought to limit the exclusionary rule to circumstances where the subject vehicle itself, rather than the owner-claimant's person, was the subject of the illegal governmental intrusion. But the Supreme Court has consistently rejected this approach. The same argument was advanced in One 1958 Plymouth, supra, and again more directly in United States Coin & Currency, supra. Although the Court recognized that forfeiture actions are brought in rem and purport to be against the "object itself," the Court rejected the notion that the object was in fact the "guilty party" and applied a defense based on the privilege against self-incrimination to a forfeiture proceeding seeking to forfeit money found on the person of a gambler. The "money" was claimed to be intended for use in

violating the provisions of the internal revenue laws and thus subject to forfeiture pursuant to 26 U.S.C. §7302.* Although the gambler had been convicted of the criminal offense, the Court held he could assert his privilege against self-incrimination in the forfeiture proceeding.** Such a defense was clearly personal -- objects do not have Fifth Amendment rights against self-incrimination. The Court thus reiterated the fundamental understanding, first expressed in Boyd, supra, that forfeiture proceedings are directed at a man's property "by reason of offenses committed by him." Id. at 718.

It is therefore inconsequential that the complained of illegality went to the person of Mr. Perez and not directly to his vehicle. In the end, the vehicle would not forfeit but for the illegal arrest of his person, the discovery of cocaine, and the subsequent arrest of his vehicle for his alleged intention to use the vehicle to transport the unlawfully discovered contraband. If the arrest was in fact illegal, all that follows was tainted thereby and could not validly be given effect.

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*The object offense was strikingly similar to the "intended to transport" basis of the instant forfeiture. See Point III, infra. .

**The defense was based on a newly announced decision applied retroactively in the forfeiture proceedings.

B. The claimant in her capacity as the voluntary administratrix of Mr. Perez's estate is entitled to assert any claim or defense which would have been available to Mr. Perez in this forfeiture proceeding.

The libel against the subject vehicle was commenced on November 1, 1974. On December 10, 1974, the true owner of the property, Mr. Perez, was the victim of a homicide. On January 21, 1975, the United States notified Mr. Perez's mother, the title-holder, and Mr. Perez's widow, the claimant, of the government's intention to compel forfeiture of their right to file a claim in property. In due course, a claim was filed by the widow. An Answer and an Amended Answer were also filed in the course of the proceedings by the claimant.

Since the widow had no record interest in the vehicle, the government's notice to her was recognition of her natural and legal interest in the proceedings as representative of her deceased husband. Her formal appointment as voluntary administratrix on September 30, 1975 was a formality intended to cement her rightful representative position arising from the fact that she was the sole distributee of her husband's intestate estate.

In her representative capacity, the claimant was entitled and indeed obliged to assert every claim and defense available to her decedent under the specific terms of New York Estates, Powers and Trust Law, §11-3.2. See Lawson v. L.R. Mack, Inc.,

282 N.Y.S. 982 (App. Div. 1935).

So too under federal law, the death of Mr. Perez did not abate his cause of action or preclude his personal defenses. The Courts of Appeal have consistently held that so long as state law recognized a survival, a civil rights action will not abate upon the death of the victim of the alleged wrong but will be maintainable by his proper representative. See, e.g., Spence v. Staras, 507 F. 2d 554 (7th Cir. 1974); Hall v. Wooten, 506 F. 2d 564 (6th Cir. 1974)

Even the dependency upon state law for survival may be questioned in light of the Supreme Court's recent recognition that wrongful death actions may be maintained in admiralty in the United States courts even absent any specific statutory authority. See Moragne v. States Marine Lines, Inc., et. al., 398 U.S. 375 (1970). Since a Fourth Amendment violation has been held to create its own inherent common law cause of action, see Bivens v. Six Unknown Agents, 403 U.S. 388 (1971), it would seem to follow that survival of such a cause of action or a claim or defense based upon a Fourth Amendment violation would likewise exist independent of any particular statutory authority.

POINT II

ANY EVIDENCE THAT MAY SUPPORT THE PLAINTIFF'S CLAIM TO FORFEITURE IN THIS ACTION WAS OBTAINED AS A RESULT OF AN ILLEGAL ARREST AND SEARCH OF THE DEFENDANT AND IS INADMISSIBLE IN THIS PROCEEDING.

A. Judge Weinfeld's denial of the defendant's motion to suppress in the criminal action did not preclude a de novo determination of the issue by the court below because the entire criminal proceeding was abated by the death of the defendant.

The court below did not decide the issue of whether Judge Weinfeld's denial of defendant's motion to suppress in his criminal trial collaterally estopped claimant from raising the issue in this forfeiture proceeding. Opinion Below, p. 3. Claimant submits that Judge Weinfeld's decision has no collateral estoppel effect in this proceeding due to the abatement of the criminal proceedings below.

Defendant was the victim of a homicide while his criminal conviction was pending on appeal. Therefore, pursuant to the rule in Durham v. United States, 401 U.S. 481 (1971) and United States v. Floyd, 496 F. 2d 982, 984, n. 2 (2d Cir. 1974), the Court of Appeals for this Circuit ordered the judgment of conviction in the criminal matter vacated and remanded to the district court. On July 28, 1975, Judge Weinfeld duly dismissed the indictment. (a-20).

Under those decisions, the entire criminal matter was

abated ab initio. The court below noted this fact. Opinion Below at 3, fn. 3. This is clear from the language in Durham:

> ...death pending direct review of a criminal conviction abates not only the appeal but also all proceedings had in the prosecution from its inception.
>
> 401 U.S. at 483

Abatement means an action is "...utterly dead and cannot be revived..." Black's Law Dictionary, 16 (4th ed. 1968).*

Even under pre-Durham law in this Circuit, the claimant in this action cannot be collaterally estopped from raising the inadmissibility of evidence illegally obtained in the prior criminal matter. The denial of the motion to suppress, being a non-appealable interlocutory order, was not subject to review in the criminal action, and indeed was not reviewed. Consequently, the government may not rely on that ruling in this action. United States v. Physic, 175 F. 2d 338, 339 (2d Cir. 1949).

B. The arrest of the defendant for possession of contraband was not founded on probable cause and any evidence discovered as a result of a search incidental to that arrest is inadmissible.

The defendant was arrested solely on the basis of information given to Special Agent Montagne by an anonymous informant. (T. 3, 16 - T. 4, 14). The informant told Montagne that a man named "Hugo Giving" of 1505 Grand Concourse in the Bronx, whom he described as a "Negro male," left his

*The Durham rule of abatement ab initio has since been overruled. See Dove v. United States, 96 S. Ct. 579 (1976). The indictment was however in fact dismissed under the authority of the rule as it

apartment almost every night with about an eighth of a kilogram of cocaine. Id. On the night of April 17, 1974, the informant identified the defendant, who was Cuban, as Hugo Giving, and on that basis alone the defendant was arrested. (T. 22, 7 - T. 23, 3).

The issue, then, is whether the information given the officers, together with any underlying circumstances, was sufficient probable cause to justify the defendant's arrest for possession of narcotics. The case law is clear that it was not. See United States v. Harris, 403 U.S. 573 (1971); Spinelli v. United States, 393 U.S. 410 (1969); Aquilar v. Texas, 378 U.S. 108 (1964); Beck v. Ohio, 379 U.S. 89 (1964); Draper v. United States, 358 U.S. 307 (1959); United States v. Manning, 448 F. 2d 992 (2d Cir.),cert. den., 404 U.S. 995 (1971); United States v. Soyka, 394 F. 2d 443 (2d Cir. 1968), cert. den., 393 U.S. 1095 (1969).

A threshold inquiry must begin with the general conduct of the officers from the beginning of their investigation. Special Agent Montagne testified that he first received information concerning "Hugo Giving" on April 10, 1975. During the week between the time this information was received, Special Agent Montagne and his fellow officers made no attempt to secure an arrest or search warrant pertaining to the defendant, (T. 14, 6-19), although Montagne conceded here that there was "ample time" to do so. (T. 48, 10-13). Agent Montagne candidly conceded

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then existed and the subsequent modification of the doctrine does not change this fact.

that the reason for this omission was that he did not think he had sufficient information to obtain an arrest or a search warrant. (T. 14, 11-15). Despite any assumption of good faith on the part of the officers, such practice cannot be squared with the requirements of the Fourth Amendment. Johnson v. United States, 333 U.S. 46 (1947); Jones v. United States, 362 U.S. 257 (1960); Aguilar v. Texas, supra. In the words of Mr. Justice Jackson on the warrant requirement:

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.
>
> Johnson v. United States, supra, 333 U.S. at 13-14.

Even assuming the propriety of the officers' failure to obtain a warrant, the information supplied to them did not rise to the level of probable cause for the defendant's arrest. In Aguilar v. Texas, supra, the Supreme Court announced standards for evaluating the existence of probable cause based on an informant's tip. The Court said:

> ...the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and

> some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed,...was "credible" or his information "reliable."
>
> 378 U.S. at 114-115.

In the instant case, despite the fact that they did not submit their information to a magistrate, the officers based their determination that the informant was reliable on the fact that he had given them information on one prior occasion which led to the arrest and conviction of two men. (T.4, 10-14). Special Agent Montagne testified that this information was supplied two weeks before the defendant's arrest, which would have been one week prior to April 10, the date when the informant first offered information about the activity of "Hugo Giving." (T. 15, 5-15). Perhaps two arrests did occur in that one week, but it is unlikely that those arrests proceeded past the arraignment stage, much less led to convictions. The reliability of this informant, then, if not highly suspect, was at best open to substantial doubt.

Spinelli v. United States, supra, is directly in point. There, the informant told FBI Agents that Spinelli was making book in a specified apartment and was using two telephones in his operations. The police corroborated the defendant's daytime use of an apartment with two telephones. The Supreme Court, however, found no probable cause for the search of the apartment, In finding the informant's information an insufficient

basis for probable cause, the Court said:

> The tip does not contain a sufficient statement of the underlying circumstances from which the informer concluded that Spinelli was running a book-making operation. We are not told how the FBI's source received his information -- it is not alleged that the informant personally observed Spinelli at work or that he had ever placed a bet with him. Moreover, if the informant came by the information indirectly, he did not explain why his sources were reliable....In the absence of a statement detailing the manner in which the information was gathered, it is especially important that the tip describe the accused's criminal activity in sufficient detail that the magistrate may know that he is relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation.
>
> 393 U.S. at 416.

The tip in the instant case was corroborated by even fewer underlying circumstances than the tip in Spinelli. The agents made no attempt to observe the defendant selling cocaine, or to make an undercover purchase from him, or even to check out his information with other sources. There was no attempt to determine whether this tip was "more substantial than a casual rumor circulating in the underworld." The informant did not allege that he had personally purchased cocaine from the suspect, or that he had observed the suspect selling cocaine, or whether he had simply heard it rumored that the suspect was dealing.

The standard for evaluating Spinelli's "underlying circumstances" which might corroborate an informant's tip is, of course, Draper v. United States, supra. The facts in this case bear scant resemblance to Draper. There, the informant provided detailed information as to the suspect's clothing, the type of satchel he would be carrying, the exact time and place of his arrival from a specified place of departure, his manner of walking and his possession of a specified narcotic. Agents verified this information in every detail and arrested Draper. The Supreme Court upheld the information as properly corroborated and affirmed Draper's conviction. The amount of detail provided in Draper contrasts sharply with the scant information here; that a black man usually left his apartment every night with a gun and cocaine. Moreover, the agents did not even know that the defendant was in possession of the cocaine and a gun until after his arrest. Verification of the informant's tip after an arrest can hardly serve as a basis for the initial determination that probable cause exists for an arrest.

The case at bar is also unlike Harris v. United States, supra. In Harris, the informant's tip was corroborated by the fact that the investigating officer had previously arrested the defendant for possession of contraband, the fact that the defendant was a known dealer in contraband, and the fact that the informer had recently made a purchase from the defendant and could supply names of people who had also done so. In the present case,

Perez had no prior arrest record, and he was not previously known to the Federal Agents as a cocaine dealer. In fact, the alleged informant's meager information was the sole basis on which the agents began their investigation. (T. 13, 16 - T. 14, 5). Also, in Harris, the Supreme Court relied heavily on the personal observations of the informant and his declarations against interest that he had purchased illicit whiskey from the suspect. 403 U.S. at 583-84. The naked statement by the informer in this case that the defendant "usually" left his apartment with a quantity of cocaine to sell, (T. 20, 13 - T. 21, 4), contains none of the Harris incidents of reliability.

In United States v. Manning, supra, the informant supplied information about the defendant's prior record, his address, the model and license number of his car, his girlfriend's address, and a description of the girlfriend. Also, the informant identified a picture of the defendant, and finally, called one day to say he had just observed drugs in the girlfriend's apartment. The agents corroborated this extensive information in every detail, went to the girlfriend's apartment, identified themselves and heard running inside. An arrest and seizure resulted. This Circuit held that the information was corroborated in sufficient detail to meet the Harris and Aguilar standards.

In the instant case by contrast, the officers did not even have an accurate description of the defendant, much less such extensive information about him. The informant described a black

male of a certain height and age with the Anglicized name of "Giving." The agents arrested a Cuban male with the Hispanic name of "Molina-Perez."

The government contends that the informant's tip was corroborated by three factors which provided probable cause for the defendant's arrest: (1) the defendant came out of the apartment house at the time the informant said he would; (2) the description of the suspect given by the informant matched the description of the defendant; and (3) the informant had said the suspect would be armed and a gun was removed from the defendant after his arrest. (T. 70, 1-6).

The fact that the defendant left his apartment house at approximately the time that the informant had said he would may have confirmed the informant's reliability to some extent, but on that basis alone a reasonable police officer could not have concluded that the rest of the informant's information was reliable and on that basis arrest the defendant. More was needed. The fact that the defendant left his house at the stated time was hardly corroborative of that part of the informant's tip most in need of corroboration -- his assertion that the defendant was involved in criminal activity.

Certainly there is nothing suspicious about someone leaving his apartment at 10:30 at night. Furthermore, the defendant did nothing that would have corroborated the informant's allegation that he usually left with some cocaine to sell. The defendant here

was not carrying any suspicious packages. He did not meet anyone in the shadows. He did not exhibit any furtive behavior. Rather, he walked toward his car at a normal gait. (T. 21, 18-20). Clearly, the defendant's conduct was not corroborative of any criminal activity, much less possession of cocaine with intent to distribute it.

Secondly, the government contends that the informant's identification of the defendant corroborated the informant's tip. However, the informant's description of the defendant was flawed in crucial respects. Hugo Molina-Perez was simply not a black male with a name sounding anything like "Hugo Giving." Furthermore, the law is settled that corroboration of identity without more is not corroboration of criminal activity sufficient to give rise to probable cause. See Beck v. Ohio, supra; Spinelli v. United States, supra; Draper v. United States, supra.

Finally, the government contends that the discovery of a gun on the defendant's person was corroborative of the informant's reliability because the informant had said that the suspect would be armed. (T. 51, 14-16). However, both law and common sense dictate that the discovery of evidence in the course of a search can hardly serve as probable cause to justify the search in the first place. Wong Sun v. United States, 311 U.S. 471 (1963).

On the other hand, the government contended in the criminal

action that this was a stop-and-frisk case like Adams v. Williams, 407 U.S. 143 (1972), (T. 67, 9-21) and Terry v. Ohio, 392 U.S. 1 (1968). This is simply not true. Judge Weinfeld, in denying defendant's motion, may have labored under a similar misconception. This was not an "investigatory detention," or a "limited intrusion," or a "stop and frisk," but rather a full blown arrest. See Adams v. Williams, supra. The officers did not approach the defendant for questioning, but rather surrounded him with flashing lights ablaze and guns drawn, ("screaming... Put your hands up where I can see them,") and summarily arrested, handcuffed and searched the defendant. (T. 51, 12 to T. 52, 4). The facts simply do not support the contention that this was a stop-and-frisk situation. The government's attempt to use that theory to justify the seizure of the defendant's gun as corroborative of the informant's reliability is completely untenable.

It is not clear on what grounds Judge Weinfeld based his denial of the motion to suppress in the criminal action below, except that he seemed to think that the informant's reliability had been properly corroborated. (T. 74, 5-23). It must be assumed therefore that he was persuaded to some extent by the government's dubious theories.

It is clear that the defendant's arrest was not founded on probable cause to believe that he was engaged in criminal activity. His arrest, therefore, was illegal and any evidence

discovered in the course of a search incidental to that illegal arrest is inadmissible against him or his estate in this forfeiture proceeding. One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965).

POINT III

ASSUMING THAT THE EVIDENCE WAS ADMISSIBLE, THE COURT BELOW ERRED IN GRANTING FORFEITURE OF THE SUBJECT VEHICLE ON THESE FACTS.

A. The court below correctly ruled that 49 U.S.C. §§781-784, to the extent that they are inconsistent with and cover the same subject matter as 21 U.S.C. §881, have been repealed by implication.

The government sought to avail itself of two separate forfeiture statutes in the case at bar. 49 U.S.C. §§781-784 is a forfeiture statute aimed at vehicles involved in the illegal transportation or facilitation of transportation of contraband, including controlled substances, counterfeit bills, and firearms. In October 1970, Congress passed the Comprehensive Drug Abuse Prevention and Control Act of which 21 U.S.C. §881 is an integral and important part. 21 U.S.C. §881 speaks specifically and exclusively to controlled substances and their effects. Thus, there is a significant overlap between 49 U.S.C. §§781-784 and 21 U.S.C. §881 in the area of controlled substances. The effect of this overlap, in the absence of any express repeal or saving language in 21 U.S.C. §881, is to repeal by implication those portions of 49 U.S.C. §§781-784 which are inconsistent with and cover the same subject matter as 21 U.S.C. §881. See United States v. Yuginovich, 256 U.S. 450 (1921) (Provisions of the Revised Statutes prohibiting and punishing the illegal distillation of spirits were repealed by implication by the Volstead

Act); J.G. Sutherland, 1 Statutes and Statutory Construction, §1922, at 388, F.E. Horack, Jr., Ed., (3d Ed. 1943). According to Sutherland:

> Repeal by implication occurs when an act not purporting to repeal any prior act is wholly or partially inconsistent with a prior statute or covers the subject matter of a prior act or section and is a substitute act. On the basis that the latest declaration of the legislature prevails, the inconsistent provisions of the prior statute, or the whole prior statute, if the later act is intended as a substitute, are treated as repealed. Where the existence of a prior act is only partially terminated by the inconsistency of provisions in a later act, the repealed provisions of the prior statute are necessarily replaced by the inconsistent provisions of the new act, thus in substance altering or amending the prior act. (emphasis added).

Thus, those provisions of 49 U.S.C. §§781-784 which cover firearms and counterfeit bills continue to be valid and in full force and effect. See United States v. LaVecchia, 513 F. 2d 1210 (2d Cir. 1975). However, those portions of 49 U.S.C. §§781-784 which deal with controlled substances, including cocaine, have been superceded by 21 U.S.C. §771.*

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* The savings clause of 21 U.S.C. §881(d) is consistent with this view as it purports to save only those "provisions of law relating to the seizure, summary and judicial forfeiture, and condemnation of property for violation of the customs laws..." which is not the basis of the libel here. Also, the savings provision of 21 U.S.C. §902 speaks only to the Federal Food, Drug, and Cosmetic Act and not to Title 49, Transportation.

The importance of this principle to the case at bar is paramount. 49 U.S.C. §781(a)(2) provides that:

> It shall be unlawful...(2) to conceal or possess any contraband article in or upon any vessel, vehicle, or aircraft, or upon the person of anyone in or upon any vessel, vehicle, or aircraft;

The statute further provides for forfeiture of vehicles so used. The superceding language of 21 U.SC. §881(a)(4) provides for forfeiture of:

> All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1) or (2)...

The more narrow language of 49 U.S.C. §781 would permit forfeiture in cases like the present one where 21 U.S.C. §881 arguably would not. Thus, in the case where a defendant offered a friend a ride home from the store, unaware that his friend was in possession of cocaine, the defendant's vehicle would be subject to forfeiture under the strict liability provisions of 49 U.S.C. §781(a)(2), whereas under 21 U.S.C. §881(a)(4) the defendant could argue that he did not use or intend to use his vehicle for the purpose of transporting cocaine. Claimant submits that the language of 21 U.S.C. §881 was written to provide for just this type of case; in other words, to relieve some of the strict liability aspects of forfeiture statutes and to require some scienter nexus between the subject vehicle and the illegal transportation of contraband.

In the instant case, 21 U.S.C. §881(a)(4) unlike 49 U.S.C. §781(a)(2), would require some greater nexus between the cocaine and the vehicle other than Perez's mere possession on his person while he was in the vehicle for less than a minute. To hold otherwise, would be to give continuing validity to the more narrow language of 49 U.S.C. §781 contrary to the implicit intent of Congress.

Unfortunately, the courts have not yet been confronted with this issue and a thorough search of reported forfeiture cases since the passage of the Comprehensive Drug Control Act in October, 1970 reveals that some courts have continued to erroneously apply 49 U.S.C. §§781-784 exclusively in forfeiture cases involving controlled substances. See United States v. One 1971 Lincoln Continental Mark III, 460 F. 2d 273 (8th Cir. 1972); United States v. Arias, 453 F. 2d 641 (9th Cir. 1972); United States v. Edge, 444 F. 2d 1371 (7th Cir. 1971); United States v. One 1964 Ford Thunderbird, 445 F. 2d 1064 (3d Cir. 1971); United States v. One 1971 Opel G.T., 360 F. Supp. 638 (C.D. Cal. 1973); United States v. One Ford Mustang 1971 Mach I, 354 F. Supp. 81 (C.D. Cal. 1973); United States v. One 1969 Buick Rivera, 358 F. Supp. 359 (S.C. Fla. 1973).

Other courts have correctly applied 21 U.S.C. §881 exclusively in forfeiture cases involving controlled substances. See Bramble v. Richardson, 498 F. 2d 968 (10th Cir. 1974); United States v. One 1972 Toyota Mark II, 505 F. 2d 1162 (8th

Cir. 1974); O'Reilley v. United States, 486 F. 2d 208 (8th Cir. 1973); United States v. One 1974 Cadillac Eldorado, 407 F. Supp. 1115(S.D. N.Y. 1975); United States v. One 1972 Datsun, 378 F. Supp. 1200 (D.N.H. 1974); United States v. One 1973 Pace Arrow, 379 F. Supp. 223 (C.D. Cal. 1974); Lee v. Thorton, 370 F. Supp. 312 (D. Vt. 1974). Indeed the Government in its initial complaint herein relied exclusively upon new §881 which was apparently its custom prior to the claimant's argument in this case.

Still other courts, including this Circuit, have overlooked the inconsistency and have cited both statutes in forfeiture cases involving controlled substances. See United States v. Capra, 501 F. 2d 267 (2d Cir. 1974); United States v. One 1973 Volvo, 377 F. Supp. 810 (W.D. Tex. 1974); United States v. One 1970 Buick Rivera, 374 F. Supp. 277 (D. Minn. 1973); United States v. One 1971 Porsche Coup, 364 F. Supp. (E.D. Pa. 1973).

These cases demonstrate that this is a case of first impression. No court since the passage of 21 U.S.C. §881, has been confronted with the issue of the extent to which 49 U.S.C. §§781-784 have been repealed by implication by the passage of 21 U.S.C. §881. Claimant submits that this case is an appropriate vehicle for such an adjudication.

B. The nexus between the defendant's alleged possession of cocaine and his fleeting contact with the subject vehicle is insufficient to constitute probable cause to believe the vehicle was used

> or was intended to be used in violation of 21 U.S.C. §881.

21 U.S.C. §881(a)(4) provides for forfeiture of:

> All conveyances, including...vehicles... which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession, or concealment of (contraband)...

An analysis of this language in relation to the facts in the present case admits of three possible interpretations.

(1) The vehicle was not used to transport a controlled substance.

The first interpretation of the statute on these facts is that the vehicle was "used...to transport" the cocaine allegedly found on Perez at the time of his arrest. The court below correctly held that "there are no facts which would support probable cause to believe that the car was actually used to transport cocaine." Opinion Below, at 9.

(2) The vehicle did not facilitate the possession of a controlled substance.

A second interpretation is that the subject vehicle facilitated the transportation, receipt, etc. of contraband. The court below, relying on sound authority, correctly held that there was insufficient probable cause to believe the vehicle "facilitated" the possession of cocaine as that term has been construed by the courts in forfeiture actions. See Opinion Below, at 9.

(3) The vehicle was not intended for use to

transport nor intended to facilitate transportation or possession of a controlled substance.

The court below held that defendant's conduct fell within the "intent" language of 21 U.S.C. §881(a)(4). Opinion Below, at 9-10. However, the court found no authority which had discussed this question or granted forfeiture on a similar set of facts. The court also noted that the extension of the forfeiture law to an intended improper use is not supported by the theoretical basis of forfeiture law. Id. fn. 7.

Plaintiff submits that the court below erred in finding sufficient probable cause to believe that the defendant intended to use the vehicle to transport or facilitate transportation or possession of cocaine. The undisputed facts do not support such an inference of intent.

The undisputed facts reveal that the defendant walked to his car on the night in question followed by Special Agents Montagne, Levine, and Garcia. (T. 21, 10 - T.22). Defendant got into his car and remained there for less than a minute during which time he did not start the car, or do anything preparatory to starting the car. He was then surrounded by the agents who immediately placed him under arrest. From these facts, several inferences about the defendant's intent are equally plausible. It is no more likely that Perez intended to move the car, than it is that he went to the car to retrieve a wallet or some other object from the glove compartment, or that he sensed

that he was being followed by non-uniformed strangers and entered the car to keep from being robbed or assaulted.

Certain other facts mitigate against an inference that he intended to transport contraband in the car. Special Agent Montagne testified that the defendant's key case was removed from his hand, or his coat pocket. (T. 26, 3-5). Assuming that the vehicle was locked, as are most vehicles parked in the South Bronx at night, the defendant would have used his keys to unlock the door, and the most logical thing to do next if one intended to operate the vehicle, would be to put the key in the ignition. Instead, Perez either put the keycase back in his pocket or continued to hold it in his hand. Id. Second, Special Agent Montagne testified that the keycase was closed, but could not recall whether it was zipped or locked. (T. 26, 6 to T. 27, 2). It is hard to imagine why Perez would have closed and somehow fastened the keycase after unlocking the door if he intended to operate the vehicle.

The fact that the court below could find no authority for its finding of intent in this case is revealing. No court has been willing to infer an intent sufficient to compel forfeiture on facts as scant as these. A vehicle "facilitates" transportation or possession if it makes the accomplishment of such tasks easier or frees them from obstructions or hindrance. Platt v. United States, 163 F. 2d 165 (10th Cir. 1946). In the present case, defendant's possession of cocaine remained

qualitatively the same at the time he walked down the street as it did when he entered the vehicle. His possession remained the same when he entered the car as it did when he got out of the car a few seconds later. He did not stash the keycase anywhere in the car, he did not put the key in the ignition, or in any way make the keycase an integral part of the car. To contend that through this contact with the car, Perez intended to make his alleged possession or concealment of cocaine any easier, or freed it from obstruction or hindrance is to stretch the meaning of "facilitation" beyond its legal scope to absurd and unjust ends.

Furthermore, as the court below noted with some reservation, application of the forfeiture laws to an "intended" improper use such as the case at bar is not supported by the theoretical basis of forfeiture statutes. "Simply put, the theory has been that if the object is 'guilty', it should be held to forfeit." United States v. U.S. Coin and Currency, 401 U.S. 715, 719 (1971).

In forfeiture cases since the passage of 21 U.S.C. §881 in 1970, a common thread runs through the fact patterns that is simply not present in the case at bar. In all of those cases, government agents had observed significant movement of the subject vehicle as it was being used to transport either persons, money, or contraband in illegal narcotics traffic. In all of those cases, the car was an integral part of that illicit activity. In none of them was the defendant's contact with the vehicle as

fleeting as it was in the instant case.

Finally, to find that the defendant's fleeting contact with his automobile in the instant case evidenced an intent to use a vehicle to transport or an intent to use it to facilitate transportation or possession would make every suspected narcotics dealer's contact with an automobile a form of facilitation. The government might seek to forfeit the vehicle of an alleged dealer as soon as he picks up his keys on the theory that under the statute he evidenced an intent to use a vehicle to transport contraband. The government might conceivably seek forfeiture of every car containing a scale and a box of plastic baggies on the theory that the car and its contents were intended to facilitate possession and sale of contraband. The court in United States v. One 1972 Datsun Coup, 378 F. Supp. 1200 (D.N.H. 1974) recognized the absurb ends to which this statute could be extended. The court said:

> ...it must be noted that the use of the automobile in our society is pervasive. There is little activity which is not "facilitated" by the use of a car in some fashion. For this reason, and because a car by itself is not contraband, common sense dictates that the law require a substantially significant connection with criminal activity before an ordinary automobile may be seized and forfeited to the Government.
>
> 378 F. Supp. at 1206.

Likewise, common sense dictates that the act of the defendant in getting into his car and sitting there for about

a minute without starting it up did not evidence an intent to use the car to transport or to facilitate the transportation of cocaine. It might have been different had the defendant stashed his keycase under the floor mat as soon as he got into the car, or had he positioned the keycase in a manner that signaled his readiness to do business, or had he merely driven the car a few blocks. On those facts an inference of intent to facilitate possession, sale, or transportation may be justified. On these facts it is not.

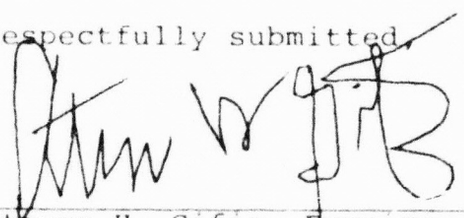
Therefore, appellant submits that the court below erred in holding that on the facts of this case Perez evidenced an intent to use the subject vehicle to transport or to facilitate transportation or possession of contraband sufficiently to subject the vehicle to forfeiture under the terms of 21 U.S.C. §881. The forfeiture statute must require a greater nexus between the contraband and the vehicle sought to be forfeited in order to achieve a just result in this and other cases. See United States v. One 1974 Cadillac Eldorado, 407 F. Supp. 1115 (S.D. N.Y. 1975) (Judge Weinfeld adopted the nexus argument in denying forfeiture).

CONCLUSION

The Court below reluctantly concluded that forfeiture was proper under the controlling statute. It did so in the face of its own admission that it found no authority to support its application of the "intended to transport" language and that forfeiture in the circumstances of this case was not supported by the theoretical basis of forfeiture law. Its conclusion was not only unsupported by authority but wholly unnecessary. Moreover, it failed to recognize the legitimate standing of claimant to assert her decedent's claim to the illegality of the evidence upon which the forfeiture was predicated. Inasmuch as there are no facts in dispute in this record, remand is unnecessary and the Court is urged to find standing and reach the claim of the inadmissibility of the evidence.

For the foregoing reasons, it is respectfully submitted that the judgment of forfeiture should be set aside and the complaint dismissed.

Respectfully submitted,



Steven H. Gifis, Esquire
68 Bayberry Road
Princeton, New Jersey 08540
Attorney for Appellant

October 28, 1976

U.S. v. ... 1974 PLYMOUTH HWY 111 ETC.

74 ... -402

PROCEEDINGS

Date Order or Judgment Noted

Filed complaint and issued summons.
Filed warrant for arrest with marshal's return and proof of publication.

Filed
Filed affvdt. and notice of claim in property of Steven H. Cifis — SHG
Filed claimant Marie Molina-Perez ANSWER to complaint — JWMR
Filed pltf. notice of motion for an order granting default judgment ret. 9-4-75.
Filed pltf's memorandum of law in support of above motion for judgment on the pleadings
Filed Claimant of motion for suppression of evidence and for summary judgment ret. 9-11-75.
Filed Claimant's memorandum of law in opposition to the pltf's motion for judgment by default and for judgment on the pleadings and in support of claimant's motion for summary judgement and to suppress evidence illegally obtained
Filed pltfs. affdvt. in support of [illegible] complaint
Filed pltf's Reply memorandum of law in support of the motion for judgment on the pleadings and in opposition to the Claimant's motion for summary judgment
Filed Claimant memorandum and notice to motion to compell ret. 11-21-75.
Filed mem. end. on [illegible] Claimant's motion for [illegible] is denied. [illegible] --Stewart, J. m/n
Filed affdvt. of the [illegible]
Filed affdvt. of U.S. [illegible]
Filed Government's memo. [illegible] interrogatories sent.
Filed Memorandum & Order: [illegible] moves for summary judgment [illegible] the pleadings. Claimant concludes that there is insufficient probable cause to believe that the automobile facilitated the possession of cocaine facilitation has been construed by courts in forfeiture cases. The Govt contends that the language of intent in covers the situation here despite the fact that the automobile was not actually used. While we have found not authority which has discussed this question, we agree that the facts here do fit within the language of the statute. Therefore, we grant forfeiture of the deft. Auto. to the government. So Ordered --Stewart, J. m/n
Filed Consent Order amending findings of the court in its memorandum of 7-13-76 [illegible] page 5, footnote 5 and page 8 are amended to provide that the seizure of the vehicle occurred after cocaine was discovered on the person of Mr. [illegible]. So Ordered---Stewart. J. m/n
[illegible] and ORDERED that pltf's motion for judgment on the pleadings is granted [illegible] vehicle is forfeited to the pltf USA, the vehicle shall be sold by the USA [illegible] date and in a manner to be agreed upon by the Claimant and the US, and [illegible] if agreement cannot be reached at the next public auction, with notice to the Claimant and that the U.S. Marshal will deposit the proceeds of the sale with the Clerk of the Court, and such funds shall remain on deposit until all appellate proceedings are concluded and said funds will be turned over to the successful appellate party and that the U.S Marshal make his deposition herein as ordered and file his return according to law--Stewart, J. Judgment entered 7-13-76-cler
Filed Claimant notice of appeal to the U.S.C.A for the Second Circuit from order of entered 7-13-76. Mailed copy to Robert B. Fiske, Jr.

Cont'd on page 3 - ala

110 Rev. Civil Docket Continuation

ATE	PROCEEDINGS	Date Order Judgment No.
21-76	Filed pltf. affdvt. and notice of motion for an order pursuant to rule 4 (a) extending time ret.10-5-76	
1-7	Filed notice of original record on appeal [illegible] the U.S.C.A. for the Second Circuit [illegible]	
5-76	Filed memo. end. on motion filed 9-21-76 We find that pltf miscounting of the time within which it could file a notice of appeal. Accourdingly, the motion to ext. the time in which to file a notice of appeal on the ground of excusable neglect is denied--Stewart, J. m/n	

a/b

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

U.S. DISTRICT COURT
FILED 11/1/74
S.D. of NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

-v-

One 1974 Plymouth Fury III Sedan Automobile, Vehicle Identification No. PH41X4F158253

Defendant in Rem.

COMPLAINT

74 Civ. 4823

Plaintiff, United States of America, by its attorney, Paul, J. Curran, United States Attorney for the Southern District of New York, for its complaint herein, alleges upon information and belief as follows:

1. This is an action for forfeiture brought by the United States of America pursuant to 21 U.S.C. §881.

2. Jurisdiction is predicated upon 28 U.S.C. §§1345 and 1355.

3. The defendant in rem is a 1974 Plymouth Fury III Sedan automobile, vehicle identification No. PH41X4F158253, (hereinafter "the vehicle"), bearing State of New York registration 615-XET and registered in the name of the legal owner, Isadora Molina, 1505 Grand Concourse, Bronx, New York.

4. On April 17, 1974, at about 10:30 P.M. agents of the United States Department of Justice, Bureau of Narcotics and Dangerous Drugs, while acting pursuant

to lawful authority, did arrest Hugo Molina-Perez near the intersection of E. 172nd Street and Wythe Street, Bronx, New York, within the Southern District of New York and did then and there seize the vehicle.

5. Prior to and at the time and place of seizure the vehicle was being used in a manner subjecting it to forfeiture pursuant to 21 U.S.C. §881, to wit, on April 17, 1974, after the aforementioned arrest, a quantity of cocaine, a controlled substance within the meaning of 21 U.S.C. §812 was removed from the vehicle which was being used to facilitate the transportation, or sale or receipt or possession or concealment of the aforementioned cocaine.

6. Following the seizure the vehicle was processed and stored and is presently being stored at the Drug Enforcement Administration Garage, 55th Street and 11th Ave, New York, New York, in accordance with 21 U.S.C. §881 and 19 U.S.C. §1605.

WHEREFORE, plaintiff, United States of America, prays that this Court issue a warrant for the arrest of the vehicle, that all persons having an interest in the vehicle be notified to appear herein and show cause why forfeiture should not be decreed, and that this Court decree forfeiture of the vehicle and its disposition pursuant to law, and award plaintiff its costs and disbursements in this action.

A-2

Dated: New York, New York

November 1, 1974

PAUL J. CURRAN
United States Attorney for the
Southern District of New York
Attorney for Plaintiff

By: William D. Brandt

WILLIAM S. KRANDT
Assistant United States Attorney
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New York, New York 10007
(212) 791-1979

Steven H. Gifis, Esquire
180 University Avenue
Newark, N.J. 07102
201-648-5464/5566

UNITED STATES OF AMERICA	UNITED STATES DISTRICT COURT
V.	Southern District of New York
One Plymouth Fury III	Docket No. 74 Civ. 4823 (CES)
	Notice of Claim in Property

TO: William S. Brandt
Assistant United States Attorney
Foley Square
New York, New York 10017

PLEASE TAKE NOTICE that the undersigned, attorney for the claimants hereby serve notice that they have an interest in the property which is the subject of the above-entitled action and that they will file an Answer to the Complaint and otherwise defend against the forfeiture as provided for by law.

This Notice is filed on behalf of Mrs. Marie Molina-Perez and Mrs. Isodora Molina. Their respective interests are described in the attached affidavit of Steven H. Gifis, sworn to on February 6, 1975.

Steven H. Gifis
Attorney for Claimants

Steven H. Gifis, Esquire
180 University Avenue
Newark, N.J. 07102
201-648-5464/5566

United States of America	UNITED STATES DISTRICT COURT
v.	Southern District of New York
One 1974 Plymouth Fury III	Docket No. 74 Civ. 4823 (CES)
	Claim In Property

Steven H. Gifis, being of full age and duly sworn according to law upon his oath deposes and says:

1. I am an attorney-at-law and represent Mrs. Marie Molina-Perez and her mother-in-law, Mrs. Isodora Molina. I am authorized on behalf of each of them to file this claim in the property subject to forfeiture in the above-entitled action.

2. I received a letter from the Assistant United States Attorney, William S. Brandt, Esquire, on February 4, 1975, informing Jack Cohen, Esquire, for whom I am serving as Of Counsel in this matter, that the above-entitled action was commenced on November 1, 1974 and that a claim must be filed within 10 days. This letter was dated January 21, 1975 but was not received by Mr. Cohen personally until February 1, 1975 as he was out of the office on a short vacation. He immediately notified me and after some investigation of the relevant facts, I am filing this claim.

3. The claimant, Mrs. Marie Molina-Perez, is the widow of Mr. Hugo Molina-Perez, whose actions resulted in the institution of this forfeiture proceeding. On information and

belief, the subject automobile was purchased by Mr. Perez on March 20, 1974 for the cash sum of $4,173. It was registered in the name of his mother, the claimant Mrs. Isodora Molina was never used by the latter, however, and was operated and treated for all other purposes as the property of Hugo Molina-Perez. I am informed by Mrs. Perez that a previous automobile had also been purchased by Mr. Perez for his use, but registered formally in the name of his mother, Mrs. Isodora Molina.

Steven H. Gifis

Sworn to and Subscribed Before
Me on this 6th day of February,
1975.

Notary Public, State of New Jersey

LINDA GARJACCIO
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires Dec. 7, 1977

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff,	DOC. NO. 74 CIV. 4823
-v-	(CES)
ONE 1974 PLYMOUTH FURY III SEDAN AUTOMOBILE, VEHICLE IDENTIFICATION NO. PH41K4F158253, Defendant in Rem.	ANSWER

MARIE MOLINA-PEREZ (hereinafter "Claimant"), for her answer to the Complaint herein respectfully alleges:

1. Claimant admits each and every allegation contained in paragraphs 1 and 2 of the Complaint.

2. Claimant admits each and every allegation contained in paragraph 3 of the Complaint except denies that Isadora Molina is the legal owner of the Defendant in Rem.

3. On information and belief Claimant denies each and every allegation contained in paragraphs 4 and 5 of the Complaint.

4. Claimant is without knowledge or information sufficient to form a belief as to the truth of the allegation contained in paragraph 6 of the Complaint.

FIRST AFFIRMATIVE DEFENSE

5. The Complaint fails to state a claim upon which relief can be granted in that it fails to allege that the one 1974 Plymouth Fury III was used to transport or to facilitate the transportation, sale, receipt, possession or concealment of a controlled substance.

6. The mere allegation contained in paragraph 5 of the Complaint that a controlled substance was removed from the vehicle is not adequate to meet the requirements of 21 U.S.C. §881 that this vehicle must be used to facilitate the transportation, sale, receipt, possession or concealment of a controlled substance.

7. The requirement of facilitation imposed by 21 U.S.C §881 requires that the government allege and demonstrate more than mere presence of a controlled substance in a vehicle.

8. This requirement of facilitation imposes a duty on the part of the government to allege and establish a knowing use of the car to accomplish some purpose directly and primarily related to the presence of the controlled substance in that car.

SECOND AFFIRMATIVE DEFENSE

9. The quantity of cocaine, alleged in paragraph 5

of the Complaint to have been removed from the vehicle, was discovered during the course of an illegal search and seizure.

10. Evidence pertaining to the discovery or presence of this illegally seized cocaine in the vehicle is inadmissible in this proceeding.

11. Since no admissible evidence exists or has been alleged as to the presence of any controlled substance in this vehicle, this proceeding must be dismissed.

THIRD AFFIRMATIVE DEFENSE

12. The 1974 Plymouth Fury III which is the subject of this proceeding, was owned by Hugo Molina-Perez, now deceased, and is includable in his estate.

13. Claimant and her eight year old son are the sole beneficiaries of the deceased, Hugo Molina-Perez.

14. Claimant and her son are now confronted with extremely dire circumstances due to the untimely death of Hugo Molina-Perez.

15. In recognition of these dire circumstances, the only other possible claimant of this vehicle, Isadora Molina (the mother of Hugo Molina-Perez and the registered, but not legal, owner of the vehicle) has assigned all of her rights and interests in the vehicle to the Claimant.

WHEREFORE, the Claimant demands judgment dismissing the Complaint herein and directing the immediate return of the subject property to her, its legal and rightful owner.

JOHN W. M. RUTENBERG
Attorney for Claimant
Office and P.O. Address
233 Broadway
New York, New York 10007
Telephone No. (212) 267-5343

Of Counsel:
STEVEN H. GIFIS, Esq.
180 University Avenue
Newark, New Jersey 07102

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

JOHN W. M. RÜTENBERG, being duly sworn, says:

I am an attorney-at-law and attorney for the Claimant, Maria Molina-Perez, in the above entitled action. I have read the foregoing answer and know the contents thereof, and the same are true of my own knowledge except as to the matters therein stated to be alleged upon information and belief and as to those matters I believe it to be true.

JOHN W. M. RÜTENBERG

Sworn to before me this
day of March, 1975.

DAVID M. [illegible]
Notary Public, State of New York
No. 24-6025730
Qualified in Kings County
Commission Expires March 30, 1976

ASSIGNMENT

I, Isadora Molina, hereby assign to my daughter-in-law, Marie Molina-Perez, all rights, title, and interest which I may have in One 1974 Plymouth Fury III Sedan Automobile, Vehicle Identification No. PH41K4F158283.

This document is intended to memoralize an oral assignment which I made to her shortly after learning of the death of her husband, Hugo Molina-Perez.

Isadora Molina

Dated: 10-12-7[illegible]

Witness: [illegible]

Commissioner of Deeds
City of New York
3-465
Certificate Filed in N.Y. County
Commission Expires Sept 1 19[illegible]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -x

UNITED STATES OF AMERICA, :

Plaintiff, :

-v- :

AMENDED COMPLAINT

74 Civ. 4823 (CES)

Plaintiff, United States of America, by its attorney, Paul J. Curran, United States Attorney for the Southern District of New York, for its complaint herein alleges upon information and belief as follows:

1. This is an action for forfeiture brought by the United States of America pursuant to 21 U.S.C. § 881, and 49 U.S.C. §§ 781-784.

2. Jurisdiction is predicated upon 28 U.S.C. §§ 1345 and 1355.

3. The defendant in rem is a 1974 Plymouth Fury III Sedan automobile, vehicle identification No. PH41K4F158253, (hereinafter "the vehicle"), bearing State of New York registration 615-XET and registered in the name of the legal owner, Isadora Molina, 1505 Grand Concourse, Bronx, New York.

4. On April 17, 1974, at about 10:30 P.M. agents of the United States Department of Justice, Bureau of Narcotics and Dangerous Drugs, while acting pursuant to lawful authority, did arrest Hugo Molina-Perez near the intersection of E. 172nd Street and Wythe Street, Bronx, New York, within the Southern District of New York and did, at or about that time, seize the vehicle.

5. Prior to and at the time and place of seizure the vehicle was being used in a manner subjecting it to forfeiture pursuant to 21 U.S.C. § 881, and 49 U.S.C. §§ 781-784, to wit, on April 17, 1974, after the aforementioned arrest, a quantity of cocaine, a controlled substance within the meaning of 21 U.S.C. § 812, and contraband within the meaning of 49 U.S.C. § 781 was removed from the person of Hugo Molina-Perez who was within the vehicle prior to his arrest.

WSB:js
74-1895

(a) Therefore the vehicle was being used or was intended to be used to facilitate the transportation, or sale or receipt or possession or concealment of the aforementioned cocaine.

(b) Alternatively, the contraband was found upon a person who was in or upon a vehicle, thereby constituting a violation of 49 U.S.C. § 781.

6. Following the seizure the vehicle was processed and stored and is presently being stored at the Drug Enforcement Administration Garage, 55th Street and 11th Ave., New York, New York, in accordance with 21 U.S.C. § 881 and 19 U.S.C. § 1605.

WHEREFORE, plaintiff, United States of America, prays that this Court issue a warrant for the arrest of the vehicle, that all persons having an interest in the vehicle be notified to appear herein and show cause why forfeiture should not be decreed, and that this Court decree forfeiture of the vehicle and its disposition pursuant to law, and award plaintiff its costs and disbursements in this action.

Dated: New York, New York

September , 1975

PAUL J. CURRAN
United States Attorney for the
Southern District of New York
Attorney for Plaintiff

By: /S/
WILLIAM S. BRANDT
Assistant United States Attorney
Office & Post Office Address:
One St. Andrew's Plaza - Room 530
New York, New York 10007
Telephone: (212) 791-1978

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

United States of America, Plaintiff, v. One 1974 Plymouth Fury III Sedan Automobile, Veh. Id. No. PH41K4F158253, Defendant in Rem.	Doc. No. 74 CIV. 4823 (CES) AMENDED ANSWER

MARIA MOLINA-PEREZ (herein "Claimant"), for her answer to the Amended Complaint, herein respectfully alleges:

1. Claimant admits each and every allegation contained in Paragraph 1 of the Complaint except denies that this action can be brought pursuant to 49 U.S.C. §§781-784.

2. Claimant admits each and every allegation of Paragraphs 2 and 3 of the Complaint except denies that Isidora Molina is the legal owner of the vehicle.

3. On information and belief Claimant denies each and every allegation contained in Paragraphs 4 and 5 of the Complaint.

4. Claimant is without knowledge or information sufficient to form a belief as to the truth of the allegation contained in Paragraph 6 of the Complaint.

FIRST AFFIRMATIVE DEFENSE

5. 49 U.S.C. §§781-784, to the extent that they are inconsistent with and cover the same subject matter as 21 U.S.C. §881, have been repealed by the implication. Accordingly, the government cannot seek to compel forfeiture of this vehicle pursuant to 49 U.S.C. §§781-784.

6. The allegation contained in Paragraph 5 of the Complaint that a controlled substance was removed from the person of Hugo Molina-Perez who was within the subject vehicle prior to his arrest is insufficient to meet the requirements of 21 U.S.C. §881 that this vehicle must be used, or intended to be used, to facilitate the transportation, sale, receipt, possession of concealment of a controlled substance.

7. The requirement of facilitation imposed by 21 U.S.C. §881 requires that the government allege and demonstrate more than mere presence of a controlled substance on the person of someone in the vehicle.

8. This requirement of facilitation imposed by 21 U.S.C. §681 imposes a duty on the part of the government to allege and establish a knowing use of the car to accomplish some purpose directly and primarily related to the presence of the controlled substance in that vehicle.

SECOND AFFIRMATIVE DEFENSE

9. The quantity of cocaine alleged in Paragraph 5 of the Complaint to have been removed from Hugo Molina-Perez while he was in the vehicle was discovered during the course of an illegal search and seizure.

10. Evidence pertaining to the discovery or presence of this illegally seized cocaine is inadmissible in this proceeding.

11. Since no admissible evidence exists or has been alleged as to the presence of any controlled substance in this vehicle or in the possession of any person within this vehicle this proceeding must be dismissed.

THIRD AFFIRMATIVE DEFENSE

12. Isidora Molina, mother of the decedent, was the registered title holder of the vehicle and as such held good and legal title thereto. Isidora Molina has assigned any and all claims to and interest in the vehicle to the Claimant.

13. Claimant is the voluntary administratrix of the estate of Hugo Molina-Perez. The Surrogate's certificate is attached hereto and made a part hereof.

14. Claimant and her nine year old son are the sole distributees of the estate of Hugo Molina-Perez who died intestate.

15. Claimant and her son are now confronted with extremely dire circumstances due to the untimely death of Hugo Molina-Perez.

16. Claimant defends this action in her capacity as voluntary administratrix of the estate of Hugo Molina-Perez with a legal interest in the distribution thereof, as the legal owner of the subject vehicle with the sole legal and possessory interest therein, and as the primary distributee of the estate of Hugo Molina-Perez with a legal and equitable interest therein.

WHEREFORE, Claimant prays for judgment dismissing the Complaint herein and directing the immediate return of the subject vehicle to her, awarding her costs and disbursements in this action, and any further relief that the Court may deem just.

JOHN W.M. RUTENBERG
Attorney for Claimant
Office and P.O. Address
233 Broadway
New York, New York 10007
Telephone No. (212) 267-5342
By: Steven H. Gifis

No 3286

373 S 1975

The People of the State of New York,

To all to whom these presents shall come or may concern,

SEND GREETING

Know Ye, *That we, having inspected the Records of our Surrogate's Court in and for th County of Bronx, do find that on the [illegible] day of September in the year one thousand nin hundred and seventy-five qualified as a voluntary administratrix by filing the affidavit i relation to settlement of estate of [illegible]Z, late of the County of Bronx, deceased,*

[illegible], Voluntary Administratrix,

and that it does not appear by said Records that said qualification and authority to act has been revoke

In Testimony Whereof, we have caused the Seal of the Surrogate's Court of the County of Bron to be hereunto affixed.

Witness, **Hon. BERTRAM R. GELFAND,** *Surrogate of our said County, in The City of New York the [illegible] day of September in the year of our Lor one thousand nine hundred and seventy-five.*

Howard W Wagner John J Sullivan

15241-73 84

Chief Clerk of the Surrogate's Court.

a-19

USDC
Filed
Jul. 30, 1975
SDNY

Steven H. Gifis, Esquire
180 University Avenue
Newark, New Jersey 07102
201-648-5464/5566

UNITED STATES OF AMERICA,
Plaintiff

v.

HUGO MOLINA PEREZ,
Defendant

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

INDICTMENT # 74 cr.535

Consent

ORDER

This matter having been opened to the court by Steven H. Gifis, counsel for the defendant, Hugo Molina Perez, and it appearing to the court while appeal was pending to the U.S. Circuit Court from his conviction in this court on the above-entitled indictment defendant died and that the Court of Appeals directed that the appeal be dismissed and it appearing that proceedings in this court have been terminated and in accordance with Durham v. U.S., 401 U.S. 481 (1971) and U.S. v. Floyd, 496 F. 2d 982, 984 n.2 (2d Cir. 1974) and it appearing further that those authorities require that the within indictment be dismissed and the United States attorney consenting hereto and the court being satisfied that good cause exists,

IT IS THEREFORE on this 30th day of July, 1975

ORDERED that the indictment be and the same is hereby dismissed and the defendant's bail is hereby discharged.

Dated: New York, N.Y.
July 28, 1975

/s/ Edward Weinfeld
Honorable Edward Weinfeld,
United States District Judge

I consent to the entry of the within order

Harry Batcheldor, Jr.
Assistant United States Attorney

A TRUE COPY
RAYMOND F. BURCHARDT, Clerk

By _____
Deputy Clerk

Mtn. to file
Jul. 30, 1975

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

UNITED STATES OF AMERICA,

Plaintiff,

-against-

One 1974 Plymouth Fury III Sedan Automobile, Vehicle Identification No. [illegible],

Defendant in Rem.

- x

74 Civ. 4923

M E M O R A N D U M

STEWART, DISTRICT JUDGE:

This action is brought by the United States seeking forfeiture of an *in rem* defendant automobile on the grounds that it was used "to facilitate the transportation or sale or receipt or possession or concealment of... cocaine" (Complaint ¶5). Plaintiff has moved for judgment on the pleadings. Claimant moves for summary judgment in her favor as the assignee of the title holder to the automobile.1/

1/ Claimant is the former wife of now deceased Hugo Molina-Perez, who, after his arrest in the defendant automobile, was convicted of possession of cocaine with intent to distribute it. Claimant was separated from Perez at the time of his arrest. The automobile was purchased by Perez on March 20, 1974. Title to the automobile was held by Perez' mother who, subsequent to Perez' death, assigned title to claimant.

Claimant challenges the seizure on a number of grounds. First, the cocaine upon which the [illegible] is predicated is alleged to have been seized improperly from the defendant Perez. Second, the automobile is claimed not to have been used in contravention of §881 and the government to have failed in its proof of probable cause. Third, claimant argues that the forfeiture works an inequity upon an innocent third party.

After receiving information from a confidential informant, agents of the Drug Enforcement Agency ("DEA") arrested Hugo Molina-Perez ("Perez") in New York, approximately one minute after he entered a 1974 Plymouth Fury III sedan, the in rem defendant in the instant action. At Perez' criminal trial for possession of cocaine with intent to distribute it, defendant moved to suppress the cocaine seized from his person on the grounds that his arrest had been without probable cause and that the search of his person incident to the arrest was therefore unlawful.[2/] After an evidentiary hearing at which two DEA agents testified, defendant's motion to suppress was denied. Defendant was convicted. While the case was pending on appeal, defendant was murdered.

2/ Defendant Perez also moved to suppress cocaine seized in his apartment. That aspect of defendant's claim does not concern us here.

1. SEIZURE OF THE COCAINE FROM PEREZ' PERSON

In this action, claimant seeks to suppress admission of the cocaine which was found on Perez' person on the ground that Perez' arrest was without probable cause and that consequently the search incident to that arrest was illegal. Although that issue was litigated before the district court at Perez' trial, claimant argues it has no collateral estoppel effect, since Perez died pending appeal. The government contends that claimant has no standing to raise the Fourth Amendment rights of Perez and, in the alternative, that the prior decision not to suppress at Perez' trial has a collateral estoppel effect upon this court. Since we agree that claimant here is without standing to raise the Fourth Amendment rights of Perez, we need not reach the other argument on this issue.[3/]

While the exclusionary rule of the Fourth Amendment is applicable to this forfeiture case, One 1958 Plymouth Sedan v. Commonwealth of Pennsylvania, 380 U.S. 693 (1965), a party

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3/ We note, however, that the death of defendant Perez while his appeal was pending abates "all proceedings had in the prosecution from its inception." Durham v. United States, 401 U.S. 481, 483 (1971); U.S. v. Floyd, 496 F.2d 954 n. 2 (2d Cir. 1974).

who seeks to raise a Fourth Amendment claim must be an aggrieved person. Wong Sun v. United States, 371 U.S. 471 (1963). As defined in Jones v. United States, 362 U.S. 257, 261 (1960) an aggrieved person is "a victim of a search and seizure, one against whom the search was directed as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search and seizure directed at someone else."

The challenge here is to a search of Perez' person incident to what the trial court found to be a legal arrest. Claimant here cannot challenge that search nor argue for suppression of the cocaine found during the search. 4/

2. PROBABLE CAUSE FOR A §881 FORFEITURE

21 U.S.C. §881 provides, in pertinent part, for the forfeiture of:

> all conveyances, including...vehicles...which are used, or are intended for use, to transport, or in any manner to facilitate the transportation, sale, receipt, possession or concealment of [cocaine].

4/ Although United States v. Physic, 175 F.2d 338 (2d Cir. 1949) has been construed to give standing in such a case, we agree with the interpretation placed upon Physic by courts which read it as standing only for the proposition that "contraband evidence will not sustain the seizure of a car for carrying contraband drugs." Ted's Motors v. United States, 217 F.2d 777, 781 (9th Cir. 1954); United States v. One 1973 Cadillac Coupe de Ville 2-door, 420 F. Supp. 173, 187 (S.D. Ga. 1976). Stated another way, Physic says no more than that the government must show probable cause to sustain the seizure of an

In a forfeiture proceeding, the government bears the initial burden of showing that probable cause exists for the forfeiture but thereafter claimant bears the burden of proof.[2/] 19 U.S.C. §1615; United States v. One 1972 Wood,

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5/ We note that the agents did not have probable cause for the initial seizure of the automobile which occurred at the time of Perez' arrest (Complaint ¶4; Gov't's brief at 2). In fact, in this proceeding the government relies entirely upon the subsequent discovery of cocaine on Perez' person. The remedy for such an illegal seizure, however, when probable cause might later be shown appears to be in dispute among the circuits. Compare Berkowitz v. United States, 340 F.2d 108, 173 (1st Cir. 1965) ("government cannot...benefit from its infringement of constitutional limitations") with United States v. One 1971 Harley-Davidson Motorcycle, 500 F.2d 351 (9th Cir. 1974). Quoting John Bacall Imports, Inc. v. United States, 412 F.2d 586 (9th Cir. 1969) (an "illegal seizure, standing alone, does not immunize the goods from forfeiture") and United States v. Eight Boxes, 105 F.2d 896 (2d Cir. 1939). In the 2d circuit decision, U.S. v. Eight Boxes, claimant argued the court lacked jurisdiction over the in rem defendants because of an improper search and seizure. The court held jurisdiction was proper despite the Fourth Amendment violation, finding support in "the decisions holding that a defendant who has been forcibly brought into this country or has been thus brought from one state into another cannot question in the federal courts the jurisdiction of the court...." At 899. This rationale has been brought into question since United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974) where the court held due process required "a court to divest itself of jurisdiction over the person of a defendant where it has been acquired as the result of the government's deliberate, unnecessary and unreasonable invasion of the accused's constitutional rights." 500 F.2d at 275. Although the Eight Boxes decision dealt most directly with the jurisdictional issue, we feel bound by its broad language which appears to agree with the Ninth Circuit decision in U.S. v. One 1971 Harley-Davidson Motorcycle, supra. We commend, however, the approach adopted by the First Circuit in Berkowitz.

19 foot Custom Boat, 501 F.2d 1327, [illegible]
734 (5th Cir. 1974); United States v. Stolin, [illegible]
(3rd Cir. 1970); United States v. One 1971 Chevrolet Corvette,
383 F. Supp. 344 (D. Pa. 1975). Claimant argues that the government has failed to meet its initial burden to show probable cause and distinguishes the statute from the forfeiture provisions of 49 U.S.C. §781. 6/ The government contends that it has met its burden of proof, that claimant has failed to prove its case and that the forfeiture provisions of 49 U.S.C. §781 are also applicable here.

First, we agree with claimant that the forfeiture provision in 21 U.S.C. §881 controls here and repeals by implication the similar provision in 49 U.S.C. §781 to the extent of any conflict. Cf. United States v. One 1972 Datsun, 376 F. Supp. 1200 (D.N.H. 1974).

6/ U.S.C. §781 states in pertinent part:
(a) it shall be unlawful (1) to transport, carry, or convey any contraband article in, upon, or by means of any...vehicle...(2) to conceal or possess any contraband article in or upon any...vehicle.... Claimant has conceded that if this statute is applicable, its language would appear to cover the conduct here, that is, Perez' mere possession of cocaine in the car. See, e.g., U.S. v. One 1971 Porsche Coupe, 364 F. Supp. 745 (D. Pa. 1973). Since we do not find §781 to be applicable here, it is unnecessary for us to pass on claimant's construction of the statute.

Second, we think that summary judgment is appropriate here as there are no material facts in dispute. The statutory showing of probable cause necessary to justify a seizure by the government under §881 is "less than prima facie legal proof and no more than 'a reasonable ground for belief in guilt'". Ted's Motors v. United States, 217 F.2d at 780 (8th Cir. 1954) (citations omitted). Probable cause, however, must be more than a "mere suspicion." United States v. One 1971 Chevrolet Corvette, 496 F.2d 210 (5th Cir. 1974). The government has submitted the testimony of the two agents at the suppression hearing in Perez' criminal trial in lieu of affidavits in support of their motion for judgment on the pleadings. Agent Montagne testified at the hearing that an informant gave a description of a man, his address, and stated that "he leaves the apartment almost every night with some cocaine...." (Tr. at 4). On the night of the arrest, the agents and the informant waited outside of the building in which Perez resided. As Perez left the building, he was identified by the informant. Perez then walked down the street and entered an automobile. Montagne testified that about one minute passed before the agents arrested Perez. (Tr. at 23). During that time, Perez apparently did not put his keys in the ignition and did not start the automobile. Montagne stated

that he found a key case either in Perez' hand or in his coat pocket. (Tr. at 26).

Montagne testified further that at the time of Perez' arrest, he was not aware that Perez was carrying any cocaine. (Tr. at 29). Cocaine was discovered in the key case after Perez was taken to the DEA headquarters to be processed. At the time of the arrest, Montagne testified that agents searched the car and did not find any contraband in the automobile. (Tr. at 34). Nevertheless, the car was seized at the time of the arrest. (Complaint ¶4).

It is no defense to a forfeiture action that the object forfeited is owned by an innocent party. See, e.g., Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974); U.S. v. One 1975 Toyota Mark II, 505 F.2d 1162 (8th Cir. 1974). The theory which allows an object owned by an innocent third party to be forfeited to the government rests "upon the fiction that inanimate objects themselves can be guilty of wrongdoing." United States v. Coin & Currency, 401 U.S. 715, 719 (1971); Calero-Toledo v. Pearson Yacht Leasing Co., supra. In a case of derivative contraband--items not intrinsically illegal in character--and especially in the case of an automobile "the use of [which] in our society is pervasive," §881 should be strictly construed "to require that

derivative contraband be substantially and instrumentally connected with illegal behavior before it is subject to forfeiture." United States v. One 1972 Datsun, 378 F. Supp. 1200, 1206 (D. N.H. 1974). In the instant case, there are no facts which would support probable cause to believe that the car was actually used to transport cocaine. The only arguable grounds for forfeiture under §881 are that Perez intended to use the automobile to transport cocaine or used or intended to use the automobile to facilitate the possession or concealment of cocaine. Since there are no facts in dispute which bear upon the issue of facilitation, we conclude that there is insufficient probable cause to believe that the automobile facilitated the possession of cocaine as facilitation has been construed by courts in forfeiture cases. See Howard v. United States, 423 F.2d 1102 (9th Cir. 1970); Platt v. United States, 163 F.2d 165 (10th Cir. 1946); United States v. One 1972 Datsun, 378 F. Supp. 1200 (D.N.H. 1974); United States v. One Buick Riviera, 374 F. Supp. 277 (D. Minn. 1973).

The remaining question is whether probable cause has been shown to this court that the automobile was intended for use to transport cocaine or intended to facilitate transportation or possession of cocaine. The government contends

that the language of intent in 881 covers the situation here despite the fact that the automobile was not used by [illegible]. While we have found no authority which has discussed this question, we agree that the facts here do fit within the language of the statute. Therefore, we grant forfeiture of the defendant automobile to the government. 7/

SO ORDERED.

United States District Judge

Dated: New York, N. Y.
February [illegible], 1976.

7/ We note, however, that the extension of the forfeiture law to an intended improper use of property is not supported by the theoretical basis of forfeiture law. 'Simply put, the theory has been that if the object is 'guilty', it should be held forfeit." United States v. U.S. Coin & Currency, 401 U.S. 715, 719 (1971). Under some circumstances, the case of intended but not actual use of property by one other than its owner which subjects the property to forfeiture under §881 might "give rise to serious constitutional questions." Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 689 (1974). However here, where the equitable owner was the intended user, (See supra note 1) we cannot say that serious constitutional questions are raised even by an innocent third party title holder. Cf. United States v. One Plymouth Fury, 476 F.2d reh. denied 509 F.2d 1324 (5th Cir. 1973); United States v. One Buick Riviera, 463 F.2d 1168 (5th Cir.) cert. denied 409 U.S. 980 (1972); United States v. One 1967 Ford Mustang, 457 F.2d 931 (9th Cir.) cert. denied 409 U.S. 950 (1972).

75-2303

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

-v-

ONE 1974 PLYMOUTH FURY III, etc.,

Defendants.

JUDGMENT AND ORDER

74 Civ. 4823 (CES)

Upon motion for judgment, pursuant to Rule 12(c), Federal Rules of Civil Procedure, and in accordance with the opinion of this Court, dated February 25, 1976, filed on February 26, 1976, and a Consent Order filed on April 28, 1976, and upon the Court being notified that an appeal will be taken from the Court's opinion during which time the Claimant asserts the vehicle will decrease in value, it is hereby

ORDERED, ADJUDGED and DECREED that the plaintiff's motion for judgment on the pleadings is granted; and it is further

ORDERED, ADJUDGED and DECREED that the vehicle be forfeited to the plaintiff United States of America pursuant to Title 21, United States Code, Section 881; and it is further

ORDERED and DECREED that the vehicle shall be sold by the United States Marshal at a date and in a manner to be agreed upon by the Claimant and the United States, and if agreement cannot be reached then at the

next regularly held public auction of such vehicles, with notice to the Claimant and that the United States Marshal will deposit the proceeds of the sale of said vehicle with the Clerk of the Court, and such funds shall remain on deposit until all appellate proceedings are concluded and thereafter said funds will be turned over to the successful appellate party; and it is further

ORDERED and ADJUDGED that the United States Marshal make his disposition herein as ordered and file his return according to law.

Dated New York, New York

July 13, 1976

/s/ U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

-v-

ONE 1974 PLYMOUTH FURY III,

Defendant.

CONSENT ORDER AMENDING FINDINGS

74 Civ. 4823 (CES)

Upon the consent of the undersigned it is hereby ORDERED that the findings of the court in its Memorandum of February 25, 1976, page 5, footnote 5 and page 8, are amended to provide that the seizure of the vehicle occurred after cocaine was discovered on the person of Mr. Perez.

Dated: New York, New York
April 23, 1976.

/s/ United States District Judge

We heweby consent to the foregoing Order:

ROBERT B. FISKE, JR.
United States Attorney for the
Southern District of New York
Attorney for Plaintiff

By: William S. Brandt
WILLIAM S. BRANDT
Assistant United States Attorney

STEVEN H. CIFIS
Attorney for Claimant

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74-1895

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA, :

Plaintiff, :

-v- : AFFIDAVIT

ONE 1974 PLYMOUTH FURY III, : 74 Civ. 4823 (CES)

Defendant. :

STATE OF NEW YORK)
COUNTY OF NEW YORK : ss.:
SOUTHERN DISTRICT OF NEW YORK)

WILLIAM S. BRANDT, being duly sworn, deposes and says:

1. I am an Assistant United States Attorney in the office of Robert B. Fiske, Jr., United States Attorney for the Southern District of New York, attorney for the United States of America. I make this affidavit in support of the Government's request, pursuant to Rule 52(b), for an amendment of this Court's finding in its opinion dated February 25, 1976.

2. The finding we seek to modify is that the initial seizure of the automobile took place at the time of Perez' arrest. This finding is set forth at page 5, footnote 5 and again at page 8 of the Court's opinion.

3. The Government's pleading somewhat abiguously states that the car was seized "at or about" the time of the arrest. (Complaint ¶4). The Government's supporting memorandum of law was clearly in error. However, both parties recognize, by implication, that the seizure of the car occurred subsequent to, rather than simultaneous with the arrest and drug discovery. Claimant viewed the arrest, apartment and car searches, and DEA processing as a continuous process at the conclusion of which the car was impounded.

See Claimant Memorandum of Law, pp. vi-vii. The Government in its reply memorandum, indicated that the discovery of cocaine in Perez' key case at DEA headquarters "was the basis for the seizure of the vehicle." Government Reply Memorandum of Law, pp. 2-3. Since the drug discovery did not occur until after Perez was arrested and processed (Claimant Memorandum of Law, p. vii), seizure of the vehicle predicated on this cocaine discovery was necessarily a subsequent event.

4. The official report relating to the events surrounding Mr. Perez' arrest fully supports the Government's request. The report indicates that after Mr. Perez was stopped and his apartment was searched he was then taken to DEA Headquarters to be processed. During the processing the cocaine wrapped in the $5.00 bill was found. The report thereafter states:

> "[PEREZ'] 1974 Plymouth Fury, New York registration 615-XET, was then seized by S/A Montagne and placed into storage at the DEA Region 2 Headquarters garage." (emphasis added)

Thus the seizure of the automobile was not made until after the discovery of the cocaine in Mr. Perez' wallet.

5. Since we believe claimant plans an appeal, an amended finding pussuant to Rule 52(b) may alleviate the necessity of a future remand for additional fact finding on the issue of seizure. Moreover, such amendment is not an insignificant judicial exercise in light of the Court's reliance on the timing of the seizure in its discussion of probable cause and the legality of the seizure. Memorandum at n. 5.

6. This motion is timely as judgment has not been entered, and the motion to amend this finding of fact need not await the entry of judgment but may be granted prior

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thereto. Rule 52(b) Fed. R. Civ. P.; 5A Moore, Federal Practice ¶ 52.11[1] at p. 2749 (1975 ed).

7. Claimant's attorney consents to this amendment and has stated to me that he would sign the annexed consent order.

WHEREFORE, it is respectfully requested that the Court amend its findings to provide that the seizure of the automobile did not occur until after the cocaine was found on the person of Mr. Perez.

William S. Brandt

WILLIAM S. BRANDT
Assistant United States Attorney

Sworn to before me this
7th day of April, 1976.

S/

[illegible]
Term Expires March 30, 1977

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	:	
Plaintiff,	:	
v.	:	NOTICE OF APPEAL
ONE 1974 PLYMOUTH FURY III, etc.,	:	74 Civ. 4823 (CES)
Defendant in rem.	:	

Notice is hereby given that One 1974 Plymouth Fury III, etc., defendant in rem above named, by MARIE MOLINA-PEREZ, claimant and real party in interest, hereby appeals to the United States Court of Appeals for the Second Circuit from final judgment and order granting plaintiff's motion for judgment on the pleadings and granting forfeiture of the defendant in rem above named to the plaintiff United States of America entered in this action on the 13th day of July, 1976.

September 1, 1976

STEVEN H. GIFIS
Attorney for Claimant
Rutgers University School of Law
180 University Avenue
Newark, New Jersey 07102
(201) 648-5464

TO: ROBERT B. FISKE, JR.
United States Attorney for
the Southern District of
New York
One St. Andrew's Plaza
New York, New York 10007

ATTN: WILLIAM S. BRANDT, ESQ.
Assitant United States Attorney

(2)

COPY RECEIVED

Robert B. Fiske, Jr.
UNITED STATES ATTORNEY

10/29/76

Marian L. Bryant